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No. 87-1337

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

KATHERINE A. BOERSMA, PERSONAL REPRESENTATIVE OF THE ESTATE OF LLOYD BOERSMA AND PHYLLIS BOERSMA, ETC., APPELLANTS

v.

DONNA KARNES, TAX COMMISSIONER OF NEBRASKA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTION PRESENTED

Whether a Nebraska law imposing a state income tax on a portion of its taxpayers' social security benefits is preempted by Section 207(a) of the Social Security Act, 42 U.S.C. (& Supp. IV) 407(a), or by the federal social-security program as a whole, 42 U.S.C. (& Supp. IV) 401 *et seq.*

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Under 26 U.S.C. (Supp. IV) 86, added by the Social Security Amendments of 1983, Pub. L. No. 98-21, §§ 121, 335(b)(2)(A), 97 Stat. 80-81, 130,

certain higher income persons must include up to one-half of their social security benefits in gross income for federal income-tax purposes. The taxpayers covered are those whose "modified adjusted gross income," as defined in 26 U.S.C. (Supp. IV) 86(b)(2), plus one-half of their social security benefits, exceeds a prescribed "base amount." 26 U.S.C. (Supp. IV) 86(b). One-half of such excess or one-half of the social security benefits, whichever is less, must be included in gross income. 26 U.S.C. (Supp. IV) 86(a). The "base amount" is $32,000 for married persons who file a joint return; $25,000 for single persons as well as for married persons who file separately and live apart throughout the year; and zero for married persons who file separately but live together (this treats such a married couple as "an integral unit" (S. Rep. 98-23, 98th Cong., 1st Sess. 27 (1983))). 26 U.S.C. (Supp. IV) 86(c). "Social security benefits" for purposes of the tax provision are both benefits received under Title II of the Social Security Act, 42 U.S.C. (& Supp. IV) 401 *et seq.*, and "tier 1 railroad retirement benefit[s]" received under 45 U.S.C. (& Supp. III) 231b, 231c. 26 U.S.C. (Supp. IV) 86(d).[1]

2. Appellants Lloyd and Phyllis Boersma, a married couple, filed a joint return in 1984. They received sufficient income in that year to require, pursuant to 26 U.S.C. (Supp. IV) 86, that they include in their gross income one-half of their social security benefits received under Title II of the Social

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[1] The statute also contains special rules governing adjustments for taxpayers' repayments of "social security benefits," receipt of certain worker's compensation benefits, and receipt of lump-sum payments. 26 U.S.C. (Supp. IV) 86(d) and (e).

Security Act. J.S. App. 3 (appellants' "gross income (including Social Security benefits) was over $88,000").[2] Accordingly, they included in gross income on their 1984 federal income tax return one-half of their $20,798 in social security benefits (*ibid.*).

Under Neb. Rev. Stat. § 77-2715 (1986), state income-tax liability for 1984 was computed by applying the appropriate state income-tax rate to the federal tax liability.[3] For appellants, the computation resulted in a state income-tax liability of $3,114. Of that amount, $766 was attributable to appellants' inclusion of one-half of their social security benefits in gross income on their federal return. J.S. App. 4.

Appellants filed a claim for a refund with appellee Donna Karnes, Nebraska State Tax Commissioner, contending that federal law precludes Nebraska from subjecting social security benefits to state income taxation. After the claim was denied, appellants filed this action against appellee Karnes and appellee Nebraska Department of Revenue in the District Court of Nuckolls County, Nebraska, seeking a re-

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[2] Hereafter, unless otherwise indicated, "social security benefits" in this brief refers to benefits received under Title II of the Social Security Act. We adopt that common usage for simplicity, even though 26 U.S.C. (Supp. IV) 86 uses the phrase to refer both to such Title II benefits and to certain railroad retirement benefits. We hereafter refer to the covered railroad retirement benefits separately.

[3] Nebraska law has subsequently been amended so that the state income tax is no longer based directly on the federal tax liability, but on federal adjusted gross income. Neb. Rev. Stat. § 77-2715 (Supp. 1987). The Nebraska tax scheme at issue in this case and discussed in this brief is the scheme in effect for 1984, but the recent amendments do not alter the analysis.

fund of that part of their state income taxes which was attributable to inclusion in gross income of one-half of their social security benefits (J.S. App. 2). The district court rejected appellants' challenge and granted summary judgment in favor of appellees (*id.* at 2-3).

3. The Supreme Court of Nebraska affirmed (J.S. App. 1-17). The court first held that state law prohibited appellants from bringing their refund suit as a class action (*id.* at 4-5). It then rejected each of appellants' federal preemption claims.

The court first rejected appellants' claim, based on the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, that the state income tax impermissibly impairs Congress's power to provide for the general welfare under the Social Security Act (J.S. App. 6-9). The court recognized that the Social Security Act was enacted by Congress in order to "'save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near'" (*id.* at 7, quoting *Helvering* v. *Davis*, 301 U.S. 619, 641, 641 (1937)). But the court disagreed with appellants' contention that *any* state taxation of any social security benefits would burden the intended operation of the federal program (*ibid.*). Thus, the court explained that the 1983 Congress had determined that certain higher income taxpayers, such as appellants, should have up to half of their social security benefits treated like other retirement benefits and therefore be subject to federal income tax (*id.* at 7-8, quoting H.R. Rep. 98-25, 98th Cong., 1st Sess. 24 (1983)).[4] The

[4] Prior to the 1983 amendments, benefits received under Title II of the Social Security Act were not subject to federal income tax. As the 1983 Congress recognized, however, that

court concluded that Nebraska's income tax, which is imposed on the same benefits of the same taxpayers as the federal income tax, no more threatens to destroy the ameliorative purposes of the Social Security Act than does the federal tax (*id.* at 8-9).

The Nebraska Supreme Court next ruled (J.S. App. 9-13) that state taxation of social security benefits is not prohibited by Section 207(a) of the Social Security Act, 42 U.S.C. (& Supp. IV) 407(a), which states:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Appellants argued that the word "levy" in Section 207(a) refers to a "tax levy" (J.S. App. 10). The court rejected the argument, concluding that, while "levy" is sometimes used to refer to a legislative imposition of a tax, Section 207(a) uses the term to refer to " '[t]he obtaining of money by legal process through seizure and sale of property' " (J.S. App. 10, quoting *Black's Law Dictionary* 816 (5th ed. 1979)).

The court pointed out (J.S. App. 11) that the words surrounding "levy" clearly show that Section 207(a) refers only to judicial proceedings or "other

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result was not based on statutory prohibition on such taxation. Rather, it was based on a series of Internal Revenue Service rulings beginning in 1938. I.T. 3194, 1938-1 C.B. 114; I.T. 3229, 1938-2 C.B. 136; I.T. 3447, 1941-1 C.B. 191; Rev. Rul. 70-217, 1970-1 C.B. 12-13. See S. Rep. 98-23, 98th Cong., 1st Sess. 25 (1983); H.R. Rep. 98-25, 98th Cong., 1st Sess. 23 (1983).

legal process" to collect money due, not to taxes imposed by legislative bodies. The court further observed (J.S. App. 12-13) that Section 207(a)'s omission of any reference to taxes contrasts sharply with the express protection against taxation in 45 U.S.C. (& Supp. III) 231m, which provides that certain railroad retirement benefits (including those covered by 26 U.S.C. (Supp. IV) 86) are not subject "to any tax or to garnishment, attachment, or other legal process." Especially in light of the rule that "exemptions from taxation are to be narrowly construed" (J.S. App. 12, citing *Bingler* v. *Johnson*, 394 U.S. 741 (1969)), the court explained (*id.* at 12-13), Section 207(a) should not be construed to protect against taxation when Congress failed to borrow the readily available language of 45 U.S.C. (& Supp. III) 231m, which "clearly sets out how to exclude federal benefits from state taxation." No contrary conclusion, the court further stated (J.S. App. 12), can be based on the parenthetical reference to Section 207 in 26 U.S.C. (Supp. IV) 86(a), which provides that certain taxpayers must include up to one-half of their social security benefits in gross income "(notwithstanding section 207 of the Social Security Act)."[5] Despite that reference, the court explained (J.S. App. 12), Section 207(a) cannot be read as a "specific indication of congressional intent to prohibit state taxation of Social Security benefits."[6]

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[5] Section 86(a) states: "Gross income for the taxable year of any taxpayer described in subsection (b) (notwithstanding section 207 of the Social Security Act) includes social security benefits in an amount equal to the lesser of—(1) one-half of the social security benefits received during the taxable year, or (2) one-half of the excess described in subsection (b)(1)."

[6] The Nebraska Supreme Court also rejected appellants' contention that the Nebraska tax is prohibited by 31 U.S.C.

DISCUSSION

The Nebraska Supreme Court correctly concluded that Nebraska's income tax scheme is not preempted by Section 207(a) of the Social Security Act or by the policy of the Act as a whole. The decision does not conflict with any decision of this Court or of any other court. Plenary review by this Court is not warranted.[7]

1. This Court has repeatedly stated that federal statutory preemption of the exercise of traditional state legislative powers is not " 'lightly to be presumed' " (*New York Dep't of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973), quoting *Schwartz* v. *Texas*, 344 U.S. 199, 203 (1952)), but is to be inferred only when displacement of state power "was the clear and manifest purpose of Congress" (*Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, No. 86-1406 (Apr. 19, 1988), slip op. 4 (internal quotation marks and citations omitted)). See

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3124, which declares that obligations of the federal government are exempt from state taxation (J.S. App. 14-17). Appellants do not renew that contention in this Court.

[7] In addition to Nebraska, twelve states subject federally taxable social security benefits to state income tax, all by defining the state tax base by reference to the federal tax base. Colo. Rev. Stat. § 39-22-103 (1982 & Supp. 1987); Iowa Code Ann. § 422.7 (West 1971 & Supp. 1988); Kan. Stat. Ann. § 79-32,117(a) (1984 & Supp. 1987); Minn. Stat. Ann. § 290.01 subd. 19, 20 (West 1962 & Supp. 1988); Mo. Ann. Stat. § 143.121 (Vernon 1966 & Supp. 1988); Mont. Code Ann. § 15-30-101, 15-30-111 (1987); N.D. Cent. Code § 57-38-01 (1983); R.I. Gen. Laws § 44-30-12 (1980); Utah Code Ann. § 59-10-112 (1987); Vt. Stat. Ann. tit. 32, §§ 5811, 5823 (1981 & Supp. 1987); W. Va. Code § 11-21-12 (1987 & Supp. 1988); Wis. Stat. Ann. ch. 71 (West 1969 & Supp. 1987). Apparently, no state currently taxes social security benefits beyond those which are now subject to federal income tax.

also *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). With respect to state taxes in particular, as the Court observed in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 634 (1981) (internal quotation marks and citations omitted), "[p]re-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." "In cases such as this," the Court further explained, "it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict" (*ibid.* (footnote omitted)). Moreover, the Court has cautioned that "[a] court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly established" (*Rockford Life Ins. Co.* v. *Illinois Dep't of Revenue*, No. 86-251 (June 8, 1987), slip op. 9). See *Smith* v. *Davis*, 323 U.S. 111, 117-119 (1944) (federal statutory exemptions from state taxation "should not be expanded or modified in any degree by the judiciary"); *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 606-607 (1943) ("tax exemptions are not granted by implication," and if Congress wishes to preempt certain state taxes, "it should say so in plain words").[8] Nothing in the Social

[8] See also *United States* v. *Wells Fargo Bank*, No. 86-1521 (Mar. 23, 1988), slip op. 3 (it is a "settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved. *E.g.*, *Oklahoma Tax Comm'n* v. *United States*").

Security Act meets the standards for federal preemption of Nebraska's income tax in this case.

2. Appellants' primary claim (J.S. 5-16) is that Section 207(a) of the Social Security Act, 42 U.S.C. (& Supp. IV) 407(a), preempts Nebraska law insofar as it subjects federally taxable social security benefits to state income tax. Appellants have not cited, and we are not aware of, any decision of any court that has construed Section 207(a) to forbid state taxation of social security benefits. And appellants' claim is contrary to the plain language of that provision and all available evidence of its intended meaning.[9]

a. Nebraska's tax scheme plainly does not violate the first clause of Section 207(a), which states that "[t]he right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity." The Nebraska law does not provide for the transfer or assignment of any taxpayer's right to future social security benefits. It merely creates a liability, based in part on the amount of benefits a taxpayer has received during the tax year, that the taxpayer may satisfy out of any available resources. Nebraska's tax has no effect on

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[9] Appellants base their primary preemption claim on Section 207 as a whole and on 26 U.S.C. (Supp. IV) 86, but the claim is properly construed as a claim about the meaning of Section 207(a). The Title 26 provision simply requires certain taxpayers to include certain amounts in gross income; and Section 207(b) simply states that Section 207(a) may not be limited, superseded, or modified by another law without an express reference to Section 207. Although both provisions might be relevant to construing the language of Section 207(a), neither contains any language that itself could plausibly be regarded as preemptive.

appellants' future receipt of any social security benefits to which they are entitled.

Nor does the Nebraska tax statute come within the protection of the second clause of Section 207(a), which states that "none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." In particular, as the Nebraska Supreme Court held (J.S. App. 10-13), Nebraska's tax statute does not subject appellants' social security benefits to "levy." That term, as used in Section 207(a), does not refer to a legislative imposition of a tax, although "levy" may have such a meaning in other contexts. Rather, the context makes clear that "levy" in Section 207(a) refers to a form of judicial process directed at obtaining specific property or money (see *Black's Law Dictionary* 816 (5th ed. 1979)). The term "does not stand alone, but gathers meaning from the words around it" (*Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). The surrounding terms—"execution," "attachment," "garnishment"—all refer to judicial processes directed at obtaining specific property or money of a specific person. And the phrase "or other legal process," which refers to "a summons, writ, warrant, mandate or other process issuing from a court" (*Black's Law Dictionary* 1085 (5th ed. 1979)), serves to characterize all the terms in the list preceding the phrase, including "levy."

b. That Section 207(a) does not apply to taxation is confirmed by comparing it with two other anti-assignment/anti-attachment provisions. Tier 1 railroad retirement benefits, which are closely related to

social security benefits,[10] are protected by 45 U.S.C. (& Supp. III) 231m, which provides that no such benefits "shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever." Unlike Section 207(a), that provision expressly grants protection against taxation, in addition to protecting against assignment and "legal process" such as garnishment and attachment. Similarly, 38 U.S.C. (& Supp. IV) 3101(a) provides that benefit payments under laws administered by the Veterans' Administration (VA)

> shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by beneficiary.

Unlike Section 207(a), but like 45 U.S.C. (& Supp. III) 231m, the VA provision expressly protects against taxation, and it does so in a clause separate from the clause protecting against assignment and legal process, including "levy."[11] Anti-taxation lan-

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[10] The amount of the railroad benefits is tied to the amount of benefits under the Social Security Act. See 45 U.S.C. 231b(a)(1), 231c(a)(1), 231c(f)(1). Moreover, tier 1 railroad retirement benefits are reduced by the amount of social security benefits payable to the retired employee, spouse, or divorced wife. 45 U.S.C. 231b(m), 231c(i)(1). Reflecting the offsetting relation between the two kinds of federal benefits, 26 U.S.C. (Supp. IV) 86 includes both within its definition of "social security benefits."

[11] This Court has discussed 38 U.S.C. 3101(a) and 45 U.S.C. 231m on several occasions. See, *e.g.*, *Bennett* v. *Arkansas*,

guage should not be engrafted onto Section 207(a) when Congress omitted such language in that provision while including it in comparable provisions.[12]

c. The legislative history further confirms that Section 207(a) does not preempt state legislation that imposes taxes (although, of course, it may bar certain legal processes that taxing authorities might use to collect taxes due). Section 207(a) was originally enacted as Section 208 of the Social Security Act of 1935, ch. 531, 49 Stat. 625. There is no reference to taxation either in the 1935 enactment, whose language is identical to what is now Section 207(a), or in the committee reports explaining the provision. H.R. Rep. 615, 74th Cong., 1st Sess. 21 (1935); S. Rep. 628, 74th Cong., 1st Sess. 32 (1935); H.R. Conf. Rep. 1540, 74th Cong., 1st Sess. (1935). By contrast, taxation is mentioned in both the texts and legislative histories of the original versions of 38

No. 86-6124 (Mar. 29, 1988) (discussing both 42 U.S.C. (& Supp. III) 407 and 38 U.S.C. 3101(a)); *Rose* v. *Rose*, No. 85-1206 (May 18, 1987) (discussing 38 U.S.C. 3101(a)); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979) (discussing 45 U.S.C. 231m). On June 27, 1988, the Court noted probable jurisdiction in *Mansell* v. *Mansell*, No. 87-201, to consider the relation between state community property law and 38 U.S.C. 3101(a) (as well as 10 U.S.C. (& Supp. IV) 1408). Nothing in that case should have any bearing on the issues raised in this appeal.

[12] Congress has enacted numerous anti-assignment/anti-attachment provisions that use language comparable to that of Section 207(a) and do not expressly prohibit taxation. *E.g.*, 5 U.S.C. (& Supp. IV) 8346, 8437(e)(2), 8470(a); 7 U.S.C. 1509; 10 U.S.C. (& Supp. IV) 1440; 22 U.S.C. (& Supp. IV) 4060(c); 31 U.S.C. 776(d)(2); 42 U.S.C. 1717. Appellants have not suggested that any such provision has been construed to prohibit taxation.

U.S.C. 3101(a) and 45 U.S.C. 231m, which were enacted, respectively, two days before and 15 days after the Social Security Act (enacted Aug. 14, 1935).[13]

In 1939, Congress reenacted Section 208 of the 1935 Act without change and recodified it as Section 207 of the Social Security Act. Social Security Act Amendments of 1939, ch. 666, § 201, 53 Stat. 1372. The committee reports' discussions of the section do not mention taxation. Moreover, they summarize the provision without mentioning the statute's reference to "levy," stating: "nor shall any moneys paid or payable [under Title II] be subject to execution or other legal process." H.R. Rep. 728, 76th Cong., 1st Sess. 45 (1939); S. Rep. 734, 76th Cong., 1st Sess. 53 (1939). Plainly, the 1939 Congress intended "levy" to refer, not to taxation, but to a kind of "legal process" akin to "execution," "attachment," and "garnishment."[14] Finally, when the 1983 Congress reenacted the provision, without change, as Section 207(a), it nowhere expressed any intent to alter the provision's meaning. Social Security Amendments of 1983, Pub. L. No. 98-21, § 335(a), 97 Stat. 130; see H.R. Rep. 98-25, 98th Cong., 1st Sess. (1983);

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[13] For 38 U.S.C. 3101(a), see Act of Aug. 12, 1935, ch. 510, § 3, 49 Stat. 609; S. Rep. 1072, 74th Cong., 1st Sess. 6 (1935); H.R. Rep. 16, 74th Cong., 1st Sess. 2 (1935). For 45 U.S.C. 231m, see Act of Aug. 29, 1935, ch. 812, § 10, 49 Stat. 973; S. Rep. 1363, 74th Cong., 1st Sess. 4 (1935); H.R. Rep. 1711, 74th Cong., 1st Sess. 12 (1935).

[14] Cf. 31 U.S.C. 776(d)(2) historical note; H.R. Rep. 97-651, 97th Cong., 2d Sess. 3, 47 (1982) (substituting "subject to legal process" in 31 U.S.C. 776(d)(2) for "subject to execution, levy, attachment, garnishment or other legal process," and explaining that the extra words were omitted as mere "surplus" and not to effect any substantive change).

S. Rep. 98-23, *supra*; H.R. Conf. Rep. 98-47, 98th Cong., 1st Sess. (1983).[15]

d. Administrative and judicial history also provide support for the Nebraska Supreme Court's reading of Section 207(a). In appellants' view, prior to the 1983 addition of 26 U.S.C. (Supp. IV) 86, Section 207 barred not just state but also federal taxation of social security benefits. Yet, when the Internal Revenue Service determined in 1938 (and again in 1941 and in 1970) that social security benefits were not subject to federal tax, it nowhere mentioned Section 207. See note 4, *supra*.[16] Similarly, no decision of this Court or of any other court, to our knowledge, has construed Section 207(a) as applying to taxation. See, *e.g.*, *Philpott* v. *Essex County Welfare Bd.*,

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[15] The 1983 amendments added subsection (b) to Section 207, 42 U.S.C. (& Supp. IV) 407(b). The new subsection provides:

> No other provision of law, enacted before, on, or after the date of the enactment of this section [April 20, 1983], may be construed to limit, supersede, or otherwise modify the provision of this section except to the extent that it does so by express reference to this section.

Congress added that provision because a number of bankruptcy courts had construed the Bankruptcy Reform Act of 1978, 11 U.S.C. (& Supp. IV) 101 *et seq.*, as implicitly superseding Section 207's declaration that social security benefits are not subject "to the operation of any bankruptcy or insolvency law" and had therefore assigned such benefits to trustees in bankruptcy. The new provision was designed to eliminate that practice. See H.R. Conf. Rep. 98-47, 98th Cong., 1st Sess. 153 (1983); H.R. Rep. 98-25, *supra*, at 82-83. There is no other discussion of Section 207 in the legislative history.

[16] In fact, the decisions give no reason at all for the determination that social security benefits are not subject to federal income tax. They merely announce the determination.

409 U.S. 413, 417 (1973) (describing the provision without any reference to taxation, stating that it "imposes a broad bar against the use of any legal process to reach all social security benefits").

e. As the Nebraska Supreme Court ruled (J.S. App. 12), a contrary conclusion cannot be based on Congress's reference to Section 207 when it provided, in 26 U.S.C. (Supp. IV) 86(a), for inclusion of certain social security benefits in gross income for federal income-tax purposes "(notwithstanding section 207 of the Social Security Act)." The parenthetical reference, of course, does not directly modify the language of Section 207(a); nor does it purport to alter the meaning of Section 207(a) even indirectly. Nor, indeed, does the parenthetical state that the new tax provision (or any taxation) is in fact inconsistent with Section 207(a). It merely states that the tax provision governs *if* there is any inconsistency. Such a provision cannot expand the scope of Section 207(a) to preempt state taxation that would otherwise be outside the reach of Section 207(a) and within traditional state legislative powers.

Moreover, the legislative history of the 1983 amendments suggests that the parenthetical reference to Section 207 was added only as a precautionary measure, not because Congress believed that Section 207(a) generally prohibited taxation of social security benefits. Both houses (and their respective committees) proposed bills that provided for the same taxation of social security benefits as ultimately was contained in 26 U.S.C. (Supp. IV) 86, but neither house (or committee) made any reference to Section 207 in that context. See S. Rep. 98-23, *supra*; 129 Cong. Rec. S3006 (daily ed. Mar. 16, 1983); H.R. Rep. 98-25, *supra*, at 47, 82-83, 314; 129 Cong. Rec.

4573, 4623-4633 (1983). The parenthetical reference to Section 207 was added in conference, and the Conference Report does not offer any explanation. H.R. Conf. Rep. 98-47, *supra*, at 70, 153.

The context in which the parenthetical was added —in Section 335 of the 1983 amendments, 97 Stat. 130—suggests the source of the drafters' caution. Subsection (a) of Section 335 added Section 207(b) to the Social Security Act, which requires an express reference to Section 207 before that provision can be overridden or modified. See note 15, *supra*. Subsection (b) of Section 335 then added express references to Section 207 to three other provisions. The addition to the new Section 86(a) of the Internal Revenue Code, in subsection (b)(2)(A), was sandwiched between two provisions in which similar references to Section 207 serve an evident function. Subsection (b)(1) added such a reference to 42 U.S.C. (& Supp. IV) 659, which makes an exception to Section 207 for legal process brought for the enforcement of child-support and alimony obligations. Subsection (b)(2)(B) added a Section 207 reference to the new Section 871(a)(3)(A) of the Internal Revenue Code (26 U.S.C. (Supp. IV)), which requires inclusion of certain social security benefits in *nonresident aliens*' gross income. That addition is explainable as a response to the fact that such income is expressly made subject to a 30% withholding by 26 U.S.C. (& Supp. IV) 1441. Although social security benefits included in gross income under 26 U.S.C. (Supp. IV) 86 are currently not subject to withholding (see Rev. Rul. 84-173, 1984-2 C.B. 16), caution apparently led the drafters to include the Section 207 reference in this section as well.

3. Appellants' secondary preemption claim (J.S. 16-20) is that, even if no specific statutory provision precludes Nebraska's tax, the tax is preempted because it would impair the policies of the social security program as a whole. As the Court in *Commonwealth Edison Co.* warned, however, in cases involving claims of federal preemption of state taxes, "it is necessary to look beyond general expressions of 'national policy' to specific federal statutes" (453 U.S. at 634). Aside from Section 207(a), appellants have pointed to nothing in the Social Security Act itself or in its legislative history that expresses any congressional intent to preempt state taxes, either prior to or after the 1983 amendments. And the Nebraska tax, which applies only to those social security benefits which are subject to federal income tax, does not conflict in any way with the Social Security Act's policies.

Even prior to the 1983 amendments, it was hardly clear whether anything in the Social Security Act preempted state taxation of social security benefits. To be sure, prior to 1984, social security benefits were not subject to federal income tax. But, as Congress expressly recognized (S. Rep. 98-23, *supra*, at 25; H.R. Rep. 98-25, *supra*, at 23-24), that exclusion, unlike the exclusion of tier 1 railroad retirement benefits, was based not on statute but on administrative rulings.[17] And those rulings did not explain what basis, if any, they had in the Social Security Act. Nor did they even mention *state* taxes.

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[17] See 1 S. Surrey, W. Warren, P. McDaniel, & H. Ault, *Federal Income Taxation: Cases and Materials* 296 (1972) (social security benefits are excluded from gross income by administrative ruling, whereas basic railroad retirement benefits and benefits under Veterans' Administration statutes are excluded from gross income by statute).

Nonetheless, it might at least have been argued before 1984, as it might be argued today, that the ameliorative purposes of the Social Security Act (see *Helvering* v. *Davis*, 301 U.S. at 641, quoted at J.S. App. 7 and page 4, *supra*) warrant an inference that Congress intended to prohibit taxation of benefits that are needed to meet basic living expenses. Even if that argument is correct, however, the Nebraska tax, like the current federal income tax, would not appear to run afoul of any such intent. The tax reaches the social security benefits only of higher income taxpayers, who should have enough other resources to meet basic expenses. See, *e.g.*, H.R. Rep. 98-25, *supra*, at 24 ("lower-income individuals, many of whom rely upon their benefits to afford basic necessities, will not be taxed on their benefits"; "only those taxpayers who have substantial taxable income from other sources will be taxed on a portion of the benefits they receive").

Perhaps, prior to 1984, it might have been argued that the Act established an even stronger policy, requiring that all social security benefits should end up in the beneficiaries' pockets as nontaxable disposable income. Cf. *Ridgway* v. *Ridgway*, 454 U.S. 46, 61 (1981) (Congress wanted to ensure that military group life insurance benefits would " 'actually reach the beneficiary,' " quoting *Hisquierdo* v. *Hisquierdo*, 439 U.S. at 584 (same for railroad retirement benefits)). Whatever the implied policies of the pre-1984 Act, however, it is the policies in place beginning in 1984 that are at issue in this case. There clearly is no inconsistency between the Nebraska tax and the post-1983 policies.[18]

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[18] We note that the insurance proceeds at issue in *Ridgway* were covered by 38 U.S.C. 770(g), which expressly bars taxa-

Congress's decision to subject a certain fraction of social security benefits for some taxpayers to federal income tax shows that the post-1983 Social Security Act embodies no policy that all benefits should end up as disposable funds in the pockets of all beneficiaries. Nebraska's tax on precisely the same benefits therefore impairs no such policy. Moreover, Congress made clear that the benefits it decided to tax should be viewed, not as tax-free social-welfare payments, but as a form of retirement pay and hence taxable, like other kinds of retirement pay in excess of paid-in contributions (see 26 C.F.R. 1.61-2(a)). S. Rep. 98-23, *supra*, at 25; H.R. Rep. 98-25, *supra*, at 24.[19] Nebraska's taxing of the same amount of benefits merely follows the federal government's characterization of those benefits.

Finally, given many states' longstanding practice of basing their income taxes on the federal tax base, state taxation of federally taxable social security benefits is a wholly predictable consequence of Congress's decision to include such benefits in gross income for federal tax purposes. Without a clear indication that Congress intended to sever the usual connection be-

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tion. Similarly, the benefits at issue in *Hisquierdo* were covered by 45 U.S.C. 231m, which also expressly bars taxation. As we have explained, social security benefits have never been expressly protected from taxation by federal statute.

[19] The tax is limited to one-half of such benefits in order roughly to approximate a tax limited to the benefits that are attributable to employers' social security contributions rather than to employees' own social-security (after-tax) contributions. See H.R. Rep. 98-25, *supra*, at 24 ("The maximum proportion of benefits taxed is one-half in recognition of the fact that social security benefits are partially financed by after-tax employee contributions.").

tween state and federal tax bases, it cannot be inferred that Congress intended to prohibit state taxation of those benefits that it subjected to federal income tax. *Cf. Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 608 ("Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes.").[20] There is no such evidence in the 1983 amendments to the Social Security Act.[21]

In sum, there is no sound basis for concluding that Congress has exempted federally taxable social security benefits from a state tax like Nebraska's. Appellants' appeal from the Nebraska Supreme Court decision therefore presents no substantial federal question.

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[20] In *Xerox Corp.* v. *County of Harris, Texas*, 459 U.S. 145 (1982), and *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940), which appellants cite (J.S. 17), the Court found state taxes preempted where the federal government tried to encourage certain activities by specifically exempting them from federal tax.

[21] There appears to be no reference to the question of state taxation of social security benefits in the legislative history of the 1983 amendments. In particular, although the estimated impact of those amendments on both federal and state tax revenues would be affected by possible state income taxation of social security benefits (state revenues directly, federal revenues by virtue of the deductibility of state income taxes (26 U.S.C. 164(a)(3)), the assumptions that were made about such state taxation in making those estimates are not reflected in the committee reports (S. Rep. 98-23, *supra*, at 2-4, 72, 78-79; H.R. Rep. 98-25, *supra*, at 161, 173-174, 178-179) or, indeed, in the *Report of the National Committee on Social Security Reform* (1983), from which the 1983 amendments derived (*id.* at App. K, 49-52).

CONCLUSION

The appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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